U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 26 2005

EIN 02 008 54278

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marin Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the AAO's previous decision will be affirmed and the petition will be denied.

The petitioner is an orthodontic practice. It seeks to employ the beneficiary permanently in the United States as an orthodontist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established its ability to pay the proffered wage, and because some evidence in the record called into question whether the petitioner or Orthodontic Centers of America (OCA) would be the beneficiary's true employer. The AAO affirmed the director's decision and dismissed the appeal.

We note that the AAO, in its prior notice of dismissal, indicated that the petitioner seeks to classify the beneficiary as a skilled worker or professional pursuant to section 203(b)(3) of the Act. This assertion is incorrect. The petitioner seeks to classify the beneficiary as a member of the professions holding an advanced degree, pursuant to section 203(b)(2) of the Act. This error does not appear to have prejudiced the outcome of the appellate decision, because both classifications are subject to the same regulations governing the petitioner's ability to pay the beneficiary's salary.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In order to establish eligibility in this matter, the petitioner must demonstrate its ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is January 11, 2000. The beneficiary's salary as stated on the labor certification is $110,000 per year.

The petitioner's initial filing included no financial documentation. Instructions printed on the Form I-140 petition warn that failure to "completely fill out this form" could result in denial; nevertheless, on the portions of the form marked for the petitioner's "Gross Annual Income" and "Net Annual Income," the petitioner simply wrote "Undisclosed." Because the petitioner is required by law to demonstrate its ability to pay the beneficiary's proffered wage, the petitioner does not have the option of keeping its finances secret. The petitioner cannot request a benefit while, at the same time, deliberately concealing information that is required to establish eligibility for that benefit.

On March 15, 2002, the director instructed the petitioner to submit "audited profit/loss statements, bank account records, and/or personnel records" as well as "the complete corporate income tax returns for the years

1999 and 2000." In response, counsel stated that the petitioner is "an affiliate of Orthodontic Centers of America," and the petitioner submitted copies of OCA's annual reports for 1999, 2000, and 2001, along with "consolidated income statements" said to be for the petitioning practice.

OCA's chief operating officer, Bartholomew F. Palmisano, Jr., stated in a letter:

> [The petitioner's] professional association is an affiliate of Orthodontic Centers of America, Inc. ("OCA") and has a multiyear, non-cancelable written contract with OCA under which OCA provides the professional association with business management services and pays its expenses. The expenses for which OCA is responsible includes [the beneficiary's] salary. The professional association reimburses OCA for these expenses through charges included in the service fees that it pays OCA, but the charges do not have to be repaid by the professional association until the office for which the charges have been incurred has become profitable (usually two to three years after opening).

We note that, according to the I-140 petition, the petitioning practice opened in 1995, over four years prior to the January 2000 priority date. Mr. Palmisano states: "[W]hile OCA is not the employer of its affiliated orthodontists such as [the beneficiary], for financial accounting and reporting purposes, the professional associations that employ the orthodontists . . . are considered to be a part of OCA" even though "state dental practice laws . . . prohibit a management company such as OCA from owning a dental practice or employing a dentist."

Although the director had specifically requested copies of the petitioner's tax returns, the petitioner did not submit them, or explain its failure to do so.

The director denied the petition, stating that the petitioner had not submitted any first-hand evidence, "beyond a statement," to document the petitioner's claimed affiliation with OCA. The director also stated: "The petitioner has failed to prove that he in fact is the intended employer of the beneficiary." The basis of this finding is not entirely clear; it appears to arise from the assertion that OCA, rather than the petitioner, would pay the beneficiary's salary.

On appeal, counsel argued that the director had failed to give sufficient consideration to the consolidated income statements. There is no documentation to confirm that these statements were, in fact, audited. Also, the statements do not identify the petitioning practice. Rather, they refer to OCA and the Washington cities of Tacoma and Puyallup. There is no evidence to affirmatively demonstrate that the petitioner's offices are the only OCA-affiliated offices in those cities.

The AAO, in dismissing the appeal, stated: "The petitioner presents no contract defining OCA's obligation to guarantee the petitioner's ability to pay the proffered wage at the priority date. The petitioner documents no payments under the supposed contracts." The AAO also noted that, according to the materials submitted, the petitioner remains liable to reimburse OCA for any salary payments made by OCA on the petitioner's behalf. Furthermore, the AAO observed that the director had specifically requested copies of the petitioner's tax returns, and that the petitioner had failed to submit them. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner's failure to submit copies of its tax returns, in response to a direct instruction, continues a pattern of willful concealment that began when the petitioner listed its gross and net income as "Undisclosed."

On motion, the petitioner submits copies of Form W-2 Wage and Tax Statements that the petitioner issued to the beneficiary. The Forms W-2 show that the petitioner paid the beneficiary $134,118.14 in 2000 and $110,000.02 in both 2001 and 2002. The petitioner also submits copies of its income tax returns from 1999 through 2002. The returns contain the following information:

	1999	2000	2001	2002
Gross receipts or sales	$1,433,432	$1,551,072	$1,642,335	$1,044,089
Salaries and wages	0	134,118	110,000	110,000
Ordinary income (loss)	203,807	56,073	79,787	62,663
Current assets	106,069	23,485	35,491	74,052

Taken by themselves, at face value, the above documents would be compelling evidence that the petitioner has paid, and thus was clearly able to pay, the beneficiary's proffered annual salary of $110,000 since the filing date in 2000. The documents, however, are not isolated, but part of a larger record of proceeding and subject to factors we shall now discuss.

The director had requested copies of the petitioner's tax returns prior to the denial of the petition, and the petitioner, at that time, did not comply. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence.

Here, the petitioner did not even submit the documents on appeal, but withheld the evidence yet again, submitting it on a motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

The petitioner's 1999 and 2000 tax returns cannot be considered "new" under 8 C.F.R. § 103.5(a)(2). The documents existed, or purport to have existed, prior to the issuance of the director's request for evidence, and therefore should have been available for submission when the director first instructed the petitioner to submit them. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the 1999 and 2000 tax returns submitted on motion will not be considered "new." If these documents had been the only materials submitted on motion, the motion would have been dismissed for failure to meet the aforementioned regulatory standards of a motion to reopen. Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

As noted above, the 1999 tax return shows no salaries paid, and the 2000-2002 tax returns show salary payments that match the amounts shown on the beneficiary's Forms W-2 for the corresponding years. This indicates that the beneficiary was the petitioner's only paid employee during those years. The petitioner did

[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

not claim any "cost of labor" expenses on the tax returns, either, which indicates that the petitioner did not report paying any nonemployee wages to contract workers.

On Form I-140, which Dr. Brent Hassel signed under penalty of perjury, the petitioner indicated its "Current # of employees" as "12." The petition was signed on December 6, 2001. On the Form ETA-750A labor certification, filed in January 2000, line 17 asks the "Number of Employees Alien Will Supervise." The petitioner indicated that the beneficiary would supervise 11 employees. This indicates that Dr. Hassel, the petitioner's sole compensated officer, is not among the 12 employees, because Dr. Hassel would be supervising the beneficiary, and not *vice versa*. The petitioner's tax returns fail to account for the salaries of these eleven employees. The net income reported on the tax returns does not appear to be sufficient to pay eleven additional salaries.

Taken together, the above documents show that, in December 2001, the petitioner claimed to have 12 "Current" employees; but on tax forms prepared a few months later, the petitioner claimed to have paid only one employee (the beneficiary) during 2001. The newly submitted tax returns are, therefore, completely incompatible with the petitioner's repeated prior claim to have 12 employees. Similar objections apply to the 2000 labor certification, which states the beneficiary would supervise 11 employees, none of whose salaries are reported on the 2000 tax return. The petitioner's credibility necessarily suffers as a result of these contradictions; we can see no way by which the petitioner's claims on the labor certification, petition form, and tax returns can all be equally accurate. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

We note, also, that the tax returns do not appear to document either significant cash infusions from OCA, or liabilities in the form of debts owed to OCA according to the terms described by Mr. Palmisano. In fact, the petitioner's motion contains no mention of OCA at all. The petitioner has never rebutted, or apparently even contested, the prior finding that the record contains no contract or other clear documentary evidence of the petitioner's affiliation with OCA.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of December 17, 2003 is affirmed. The petition is denied.